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Multi-level Governance in Competition Policy: the European Competition Network

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☞ Accountability; Competition policy; Due process; Enforcement; EU law; European Competition Network; European governance

Abstract

This article analyses the general characteristics and practical cooperation mechanisms of the European Competition Network (ECN) as well as the initial experiences of policy enforcement through this network in the light of and in response to the European Commission Report on the Functioning of Regulation 1/2003. In general, this analysis is positive regarding the initial experiences of ECN. The article, however, finds significant accountability and due process problems caused in particular by the opacity of network management. Primarily, the article argues that, as an unintended consequence of Modernisation, EU competition policy has become vulnerable to the general systemic problems of multi-level governance.

Introduction

Regulation 1/2003¹ or the “Modernisation Regulation”, as popularly called, abolished the centralised individual exemption regime in the enforcement of art.101(3) TFEU (ex art.81(3) EC) and decentralised the enforcement of arts 101 and 102 TFEU (ex arts 81 and 82 EC) by giving the national courts and the national competition authorities (NCAs) alongside the European Commission the power to apply these provisions in their entirety. The predecessor of Modernisation Regulation, Regulation 17/62,² was described as the “procedural bible” of the Commission due to the extraordinary amount of leverage it had attributed to the Commission not just in the enforcement of competition rules but also in the determination of broader

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¹ Regulation 1/2003 on the Implementation of the Rules on Competition laid down in arts 81 and 82 of the Treaty [2003] OJ L1/1 (hereinafter the Modernisation Regulation).

² Regulation 17/62, First Regulation implementing arts 85 and 86 of the Treaty [1962] OJ 13.

policy objectives under the centralised individual exemption regime.³ Therefore, its abolishment and replacement with a decentralised enforcement regime represented an unprecedented systemic change for EU competition policy: a “cultural revolution”.⁴

Nevertheless, rules of competition constituted an essential part of the European economic constitution, and therefore, consistency in their enforcement was not to be compromised even in the era of decentralisation.⁵ Therefore, in order to regulate relations between the soon to become 28 competition authorities of Europe and to protect consistency in enforcement, a network was formed between the NCAs and the Commission which was named the “European Competition Network” (ECN).⁶ ECN did not reflect the dynamics of multi-level policy networks as determined by the political science models and it was rather atypical among the examples of multi-level policy networks in Europe. Due to its atypical nature, predictions regarding the future operation of this network were very sceptical at its inception. Most substantially, as will be explained in the next part of this article, the Commission occupies a different “managerial position” in the ECN with certain enforcement powers not shared with and monitoring powers over the NCAs. Particularly under this hierarchical structure, it was doubtful whether the NCAs would build solidarity and mutual trust in their relations with the Commission and whether the ECN would accomplish its primary task of providing the infrastructure for cooperative and consistent enforcement.

The Modernisation Regulation and the decentralised enforcement regime have now completed their sixth year in operation. Therefore, as required by the Modernisation Regulation,⁷ the Commission submitted a report to the European Parliament and the Council regarding the operation of the Regulation.⁸ In this report the Commission tells a remarkable success story regarding the initial experiences of ECN and goes as far as claiming that the ECN represents a general model for multi-level policy networks in Europe.⁹

This article takes a retrospective look at the initial experiences of ECN in the light of and in response to the Commission’s report. The first part of the article summarises the general characteristics of ECN as a network design and its technical cooperation mechanisms, whereas the second part evaluates the operation of this network since its inception. In general, the tone of the article regarding the initial experiences of ECN is positive. Particularly emergence of an extensive communication culture between competition officials appear as a positive development from the perspective of network management and it proves that despite its atypical characteristics, the ECN is not called a “network” by sheer coincidence, but it represents a genuine example of a network in the technical sense of the word. Nevertheless, this extensive communication culture comes both as a strength and weakness from the perspective of network management. Informality in communication between competition officials and authorities results in opacity

³ Lee McGowan, “Safeguarding the Economic Constitution: The Commission and Competition Policy”, in Neill Nugent (ed.), *At the Heart of the Union: Studies of the European Commission* (London: Macmillan, 1997), p.147; Lee McGowan and Stephen Wilks, “The First Supranational Policy in the European Union: Competition Policy” (1995) 28 *European Journal of Political Research* 141, 149.

⁴ Claus Dieter Ehlermann, “The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution” (2000) 37 C.M.L. Rev. 537.

⁵ Firat Cengiz, “The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement” EUI Working Papers, MWP 2009/05, p.4.

⁶ Notice on Cooperation within the Network of Competition Authorities [2004] OJ C101/43 (hereinafter the Network Notice), para.1.

⁷ Modernisation Regulation, art.44.

⁸ Communication from the Commission to the Parliament and the Council, *Report on the Functioning of Regulation 1/2003*, Brussels 24.9.2009, COM(2009) 206 final (hereinafter the Commission Report). The report itself is a rather short communication summarising main findings of the Working Paper accompanying the report. See, Commission Staff Working Paper accompanying the Communication from the Commission to the Parliament and Council, Brussels, 24.9.2009, SEC(2009) 574 Final (hereinafter the Staff Working Paper). For the sake of simplicity, the text of this article will refer to both documents as the “Commission Report”, whereas footnotes will distinguish between the two documents and state the specific place of reference.

⁹ Commission Report, p.10; Staff Working Paper, p.89.

in network management which ultimately translates into accountability and due process problems. The principal argument of this article is that, as an unintentional and unpredicted result of decentralisation, competition policy has become vulnerable to general systemic problems of multi-level governance. This can be seen as a challenge, if not a threat, to the “special status” of competition policy in the EU, since under the previous centralised enforcement regime, competition policy was different from other policy areas in terms of its enforcement method; and, therefore, it was largely immune to the systemic problems of multi-level governance in contrast to other policies. Arguably, these problems will be voiced intensely in the future and will expect for solutions to be found ultimately by the Commission, the network manager, possibly with the contributions of other network members. Additionally, this general conclusion suggests that the epistemic community of EU competition law and policy may benefit from more intense communications with other policy fields and the broader debate on EU governance if they are to contribute to the finding of solutions.

European Competition Network: The Network Design

This first part of the article comments on the ECN as a general network design. The first section below summarizes the general characteristics of ECN as a multi-level policy network and explains the reasons for high scepticism voiced against this network at the time of its inception. Afterwards, the second section turns to practical cooperation mechanisms of the ECN as safeguards for effectiveness and consistency under the decentralized enforcement regime.

General Characteristics of the Network

ECN came into existence in order to provide the infrastructure of cooperation between the NCAs and the Commission, to contribute to the emergence of a common competition culture in Europe, and, finally, to protect consistency in the enforcement of arts 101 and 102 TFEU in the era of decentralisation.¹⁰ Nevertheless, the ECN was dramatically different from other multi-level policy networks in Europe in terms of its design, and it did not reflect the characteristics of networks as determined by the policy network models.¹¹ Although the network characteristics determined by the political science literature represent

¹⁰ Network Notice, para. 1.

¹¹ A comparison of multi-level policy networks operating in other policy fields can be found in D. Coen and M. Thatcher, “Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies” (2008) 28 *Journal of Public Policy* 49. Under this comparison, ECN appears a highly different network design with its strong juridified structure, its cooperation mechanisms predetermined in hard law (the Modernisation Regulation) and soft law (various Commission notices) and the special managerial position of the Commission with enforcement powers not shared with and monitoring powers over the NCAs. The “European Regulators Group” represents the only example of European multi-level policy networks which could compare to the ECN in terms of its strong network design. However, under the reform of EU regulatory framework for telecommunications, this network gave body to a permanent institution named “European Regulators for Electronic Communications” which is equipped with an office with legal personality. See Regulation 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [2009] OJ L337/1. Therefore, from the technical perspective, it is questionable whether the Regulators Group can still be deemed a multi-level policy network or it should more plausibly be identified as an institution. Likewise, ECN appears a very strong network design in comparison to networks operating in different polities. For instance, comparative research shows that, in contrast to the ECN, multi-level networks operating in the field of antitrust policy in the US were formed voluntarily upon agreement of the actors involved; they evolved in time through experimentation; and finally, in these networks, at least from a formal perspective, all actors enjoy equal positions and powers. See Firat Cengiz, “Management of Networks between the Competition Authorities in the EC and the US: Different Polities, Different Designs” (2007) 3 *European Competition Journal* 413, 429.

ideal conditions and no practical example of network would reflect all of these characteristics perfectly, the ECN ran counter to almost all of the characteristics of a successful network design. Therefore, at the time of its inception, predictions regarding the future operation of ECN were largely sceptical.¹²

Networks generally emerge naturally between actors who need each other's cooperation in search of a common goal.¹³ The ECN on the other hand was designed centrally and largely to the desire of the Commission. Although some authors argue that a competition network had existed even at the time of Regulation 17/62, this was an epistemic network at best comprising of irregular and ad hoc contacts between the DG IV officials and officials of the strong NCAs of the time, but not a formalised enforcement network.¹⁴ The ECN, on the other hand, came with a very strong and juridified structure and therefore, its formation represented a clear break away from the past, as far as relations between the competition authorities and officials are concerned. Surely, the NCAs played a certain role in the design of the new regime and the structure of the ECN. To begin with, most of the NCAs enthusiastically agreed with the enhancement of their enforcement powers under the new regime.¹⁵ Likewise, communications took place between the national and Commission officials during the preparation phases of Modernisation Regulation and the Commission's Network Notice, which determined the cooperation mechanisms of the network in detail. Nevertheless, still, in many respects the Commission took some strategic decisions despite the differences of opinions of the NCAs and their strong resistance. For instance, the *Bundeskartellamt*, arguably the most powerful and prestigious competition authority in Europe after the European Commission, who lost its significance to the Commission under Regulation 17/62 and had to wait for more than 40 years for its time to come, was against the abolishment of individual exemption regime as such, but favoured sharing of the exemption authority between the Commission and the NCAs.¹⁶ At the other extreme, decentralisation meant devotion of serious resources to the enforcement of arts 101 and 102 in countries such as Denmark and Belgium, which did not have national competition authorities or laws for a long time but left this matter to be addressed at the EU level. Likewise, many NCAs alongside the European Parliament strongly demanded that for the sake of legal certainty and the reassurance of business, work allocation rules of the ECN be set forth in the Modernisation Regulation and become legally binding and

¹² Cengiz, "The European Competition Network" EUI Working Papers, MWP 2009/05, p.14.

¹³ D. Knoke and J.H. Kuklinski, "Network Analysis: Basic Concepts", in Grahame Thompson (et al. eds), *Markets, Hierarchies and Networks: The Coordination of Social Life* (London: Sage, 1994), p.174; D. Knoke and J.H. Kuklinski, *Network Analysis, Sage University Series: Quantitative Applications in the Social Sciences, No.28* (London: Sage, 1982), p.9; M.J. Smith, *Pressure, Power and Policy: State Autonomy and Policy Networks in Britain and the United States* (London: Harvester Wheatsheaf, 1993), p.56.

¹⁴ D.J. Gerber, "The Evolution of a European Competition Law Network", in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Oxford: Hart Publishing, 2004), p.49; S. Wilks, "Understanding Competition Policy Networks in Europe: A Political Science Perspective", in *European Competition Law Annual 2002, 2004*, p.74; S. Wilks, "Competition Policy: Challenge and Reform", in H. Wallace, W. Wallace and M.A. Pollack (eds), *Policy-making in the European Union*, 5th edn (Oxford: Oxford University Press, 2005), p.127.

¹⁵ See in general European Commission, White Paper on Reform of Regulation 17, Summary of the Observations, February 29, 2000; available at http://ec.europa.eu/comm/competition/antitrust/others/wp_on_modernisation/summary_observations.pdf [Accessed August 4, 2010].

¹⁶ U. Böge, "The Discussion on the Modernisation of EC Antitrust Policy: An Update from the Bundeskartellamt's View", in *European Competition Law Annual 2002, 2004*, p.68; M. Müller, "The German View", in José Rivas, Margot Horspool (eds), *Modernisation and Decentralisation of EC Competition Law* (The Hague: Kluwer, 2001), pp.89–91.

enforceable by the EU and national courts.¹⁷ Nevertheless, in the end, relying on the argument of network flexibility, the Commission preferred designing the work allocation regime in the non-binding Network Notice.¹⁸

Networks generally correspond to flat organisations which produce policy outcomes based on agreement and consensus which are reached through extensive communication between network members.¹⁹ Even if some actors may be more influential than others, their superiority generally comes from greater resources and expertise they enjoy but not from differentiated authority.²⁰ The ECN, on the other hand, stands on a hierarchical structure, where the Commission enjoys a clearly distinguished managerial position with certain powers not shared with the NCAs.²¹ Most significantly, Modernisation Regulation preserves one of the central pillars of previous centralised enforcement regime by requiring the NCAs to close their proceedings when the same matter is being investigated by the Commission.²² This prerogative of the Commission was popularly blamed for the lack of enforcement enthusiasm at the national level at the time of Regulation 17/62.²³ Therefore, its continued existence in the new “decentralised” enforcement regime proved controversial. The prerogative of the Commission to bring national investigations to an end by opening its own proceedings was described as the “safety valve” of the entire network design.²⁴ At the inception of Modernisation, the Commission was expected to use this power only under extraordinary circumstances, such as parochial and hostile enforcement of arts 101 and 102 TFEU by the NCAs to protect their national economies, as redundant utilisation of such a drastic power would bruise the trust-based relations between the Commission and the NCAs and, consequently, could destroy the enthusiasm of the NCAs to participate in policy enforcement.²⁵ Nevertheless, under the framework of networks mutual trust between members constitute the main basis of cooperation, and it was uncertain whether the NCAs would build that kind of trust and solidarity in their relations with the Commission, and whether particularly the well-established NCAs would agree to play a subordinate role to that of the Commission under the hierarchical structure of ECN.²⁶

¹⁷ European Commission, White Paper, Summary of the Observations; available at http://ec.europa.eu/comm/competition/antitrust/others/wp_on_modernisation/summary_observations.pdf [Accessed August 4, 2010], p.19.

¹⁸ See remarks by Mario Monti in Panel Discussion: “The Network Concept, Competition Authority Networks and Other Regulatory Networks” in *European Competition Law Annual 2002, 2004*, pp.5–6.

¹⁹ B. Marin (ed.), *Generalized Political Exchange: Antagonistic Cooperation and Integrated Policy Circuits* (Frankfurt a.M.: Campus/Westview Press, 1990), p.16; B. Marin and R. Mayntz, “Introduction: Studying Policy Networks”, in B. Marin and R. Mayntz (eds), *Policy Networks: Empirical Evidence and Theoretical Considerations* (Colorado: Westview Press, 1991), p.14. P. Kenis and V. Schneider, “Policy Networks and Policy Analysis: Scrutinizing a New Analytical Toolbox”, in *Policy Networks*, 1991, p.27.

²⁰ Cengiz, “The European Competition Network”, EUI Working Papers, MWP 2009/05, p.429.

²¹ For instance although the individual exemption regime has been abolished, the Commission may on its initiative issue decisions finding “inapplicability” in order to define policy at the EU level when novel issues arise. Modernisation Regulation, art.10.

²² Modernisation Regulation, art.11(6).

²³ See, e.g. B. Krueger and A. Klimisch, “Decentralised Application of E.C. Competition Law: Current Practice and Future Prospects” (1999) 24 E.L. Rev. 463, 469–470; C.D. Ehlermann, “Implementation of EC Competition Law by National Anti-Trust Authorities”, (1996) 17 E.C.L.R. 88, 91; B.J. Rodger, “The Commission White Paper on Modernisation of the Rules Implementing Articles 81 and 82 of the E.C. Treaty” (1999) 24 E.L. Rev. 653, 653–54.

²⁴ M. Monti, “The Network Concept, Competition Authority Networks and Other Regulatory Networks” in *European Competition Law Annual 2002, 2004*, p.8.

²⁵ Cengiz, “The European Competition Network” EUI Working Papers, MWP 2009/05, p.420. In the Network Notice the Commission declared its intention to use this power only under certain circumstances which in general imply that there is a risk of inconsistent or parochial enforcement. See Network Notice, para.54.

²⁶ S. Kingston, “A ‘New Division of Responsibilities’ in the Proposed Regulation to Modernise the Rules Implementing Articles 81 and 82 EC? A Warning Call” (2001) 22 E.C.L.R. 340, 344; U. Böge, “The Commission’s Position within the Network: The Perspective of the NCAs” in *European Competition Law Annual 2002, 2004*, p.251.

Effective functioning of a network and ultimately consistent policy enforcement requires a certain degree of harmony in the resources, powers, experiences and independence the network members enjoy, so that network members would embrace similar interests and pursue similar goals. It was doubtful whether such harmony existed between the NCAs particularly in the lack of harmonisation of national procedural standards.²⁷ In terms of resources and independence, NCAs of the Eastern European states were a particular matter of concern, as management of liberal market economy and competition enforcement were considerably novel phenomena in those states at the time. Accordingly, some authors argued that the ECN would follow a model of varied speed, where more resourceful and experienced NCAs would position themselves at the centre with continuous contacts with the Commission and privileged access to the policymaking stage leaving behind the less powerful NCAs who would form the periphery of the network.²⁸ Based on the data of intra-EU trade turnover, the number of multi-national companies incorporated in Member States, and the geographic markets targeted in previous Commission decisions, it was predicted that the German, French, UK, Italian and Dutch authorities would be the most active members of the network.²⁹

Cooperation mechanisms of networks generally emerge naturally in time as networks continue to function. These mechanisms mostly correspond to routinised courses of conduct achieved through past cooperation experiences and compromises achieved through resolution of past conflicts. The ECN, on the other hand, came into existence as a highly juridified network with specific and detailed cooperation mechanisms predetermined by the Modernisation Regulation and the Network Notice of the Commission.³⁰ In the design of ECN, formalism emerged as a natural precaution against the risk of inconsistency in the lack of a formal tradition of cooperation and a common discourse between the network members. However, in order to function effectively, networks should enshrine a delicate balance between formalism and flexibility whereby management of the network would be adaptable to novel circumstances without jeopardising the consistency of policy enforcement.³¹ It was uncertain whether this balance was struck accurately in the context of the ECN and only the functioning of network in practice would provide the necessary evidence as to whether under such formalised management mechanisms the network would still be able to show responsiveness to novel problems it would face.³²

Last but not least, the ECN does not incorporate any strong dispute resolution mechanism. The Advisory Committee on Restrictive Practices and Dominant Positions, which consists of the Commission and NCA representatives, provides the only possible forum for the resolution of disputes. The Commission is under an obligation of consultation with the Committee before taking a positive decision in enforcement of arts 101 and 102 TFEU.³³ In such cases discussions within the Committee may lead to a written opinion to

²⁷ C. Gauer, "Does the Effectiveness of the EU Network of Competition Authorities Require a Certain Degree of Harmonisation of National Procedures and Sanctions?" in *European Competition Law Annual 2002, 2004*, pp.187–201; F. Jenny, "Does the Effectiveness of the EU Network of Competition Authorities Depend on a Certain Degree of Homogeneity within its Membership?" in *European Competition Law Annual 2002, 2004*, p.208

²⁸ Wilks, "Understanding Competition Policy Networks in Europe", *European Competition Law Annual 2002, 2004*, p.133.

²⁹ S. Wilks, "Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?" (2005) 18 *Governance* 431, 445; M. Drahos, *Convergence of Competition Laws and Policies in the European Community* (the Hague: Kluwer, 2001), p.222.

³⁰ Cengiz, "The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement" EUI Working Papers, MWP 2009/05, p.9.

³¹ I. Maher, "Networking Competition Authorities in the European Union: Diversity and Change" in *European Competition Law Annual 2002, 2004*, p.224.

³² Maher, "Networking Competition Authorities in the European Union", in *European Competition Law Annual 2002, 2004*, p.224.

³³ Modernisation Regulation, art.14(1).

which the Commission is required to give utmost account.³⁴ Likewise, decisions of the NCAs may also be taken to the Committee, without leading to a formal written opinion, however.³⁵ Lack of a strong dispute resolution mechanism particularly against possible conflicts of case allocation was a matter of concern, and it was predicted that the NCAs would wrangle to assume jurisdiction for parochial reasons in cases of political dimension.³⁶

Table: Summary of predictions regarding the functioning of ECN

General Characteristics of Networks	ECN	Predicted Outcome
voluntary formation	central planning	rigid network, unresponsive policy enforcement
design through experimentation	pre-determined formal cooperation mechanisms	
harmony in membership	disharmony in membership	network of varied speed
equal positions of members	hierarchical	distrust between members
dispute resolution	no strong mechanism	case allocation disputes

In summary, at the time of its inception, predictions regarding the future functioning of ECN were very sceptical due to the unique characteristics of this network. In one sentence, to be a successful experiment, the network was too strong in terms of its structure and too weak in terms of its membership.

Cooperation Mechanisms of the Network

In terms of practical cooperation between the competition authorities, the ECN essentially sits on two pillars: an informal case allocation regime which is set forth in detail in the Commission's Network Notice and extensive information exchange mechanisms between the competition authorities. In fact, if it were not for the strategic aims of providing an infrastructure for communication between the competition officials and contributing to the emergence of a competition culture, the ECN could best be described as an informal jurisdiction allocation regime surrounded with information exchange mechanisms, rather than a multi-level policy network.

The principal aim of case allocation regime is to attribute each individual investigation, to the possible extent, to a single "well placed authority" based on the link between the geographical market in question and the territory of the competition authority involved.³⁷ Although NCAs are empowered to close their investigations or to reject complaints on the ground that another NCA is dealing with the same case, they have no obligation to do so, and in principle they may conduct parallel investigations.³⁸ In such cases they are expected to coordinate their proceedings in order to prevent inconsistent application.³⁹ Ultimately, however, the Commission is deemed the well placed authority in cases where the investigation involves more than three Member States.⁴⁰ In other words, the underlying rationale of work allocation regime is to minimise the number of authorities involved in each investigation and thereby to prevent emergence of conflict and inconsistency in enforcement to the possible extent.

³⁴ Modernisation Regulation, art.14(5).

³⁵ Modernisation Regulation, art.14(7).

³⁶ S. Brammer, "Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation" (2005) 42 C.M.L. Rev. 1383, 1402. See also, I. Maher, "The Rule of Law and Agency: The Case of Competition Policy", Chatham House, International Economics Programme, IEP Working Paper 06/01, p.13.

³⁷ Network Notice, paras.5–15.

³⁸ Modernisation Regulation, art.13(2).

³⁹ Network Notice, para.13.

⁴⁰ Network Notice, para.14.

When it comes to information exchange, the NCAs are obliged to inform the Commission when they open an investigation in application of arts 101 and 102 TFEU which may also be shared with the other NCAs.⁴¹ Information exchange at the outset of investigations supports the work allocation regime by preventing parallel enforcement by multiple authorities without coordination. Likewise, the NCAs are under an obligation to inform the Commission before taking a positive decision in enforcement of arts 101 and 102 TFEU and communicate their summary decisions to the Commission on which the Commission may express written or oral observations.⁴² Besides being ordinary tools of cooperation, these information exchange mechanisms also work as monitoring channels, through which the Commission comes into full information regarding the facts before the NCAs, the enforcement strategy they follow and the decision they intend to take.⁴³ Consequently, the Commission gains the ability of intervening either through soft communication or in extreme cases by opening its own investigations, before the NCAs take any action putting consistency at risk or running counter to the dynamics of European competition law regime as established by the Commission and the EU courts.

Finally, in cases where the Commission or another NCA needs information or evidence from the territory of a particular Member State in the course of their investigations, they may approach and ask the NCA of the Member State in question to utilise its fact-finding powers, to collect evidence in its territory and to communicate such evidence to the requesting authority.⁴⁴ When this request comes from the Commission, the NCAs are under an obligation to respond positively.⁴⁵ Although the range of information which can be exchanged is rather extensive including confidential information and business secrets, there are certain safeguards aiming at protection of rights of defence which come into play particularly when anticompetitive behaviour may result in imposition of criminal remedies under the receiving authority's legal regime.⁴⁶

Initial Experiences with the European Competition Network

After having summarised the characteristics of ECN as a network design and its cooperation mechanisms, this article now turns to the initial experiences of policy enforcement through this network. The first section below analyses the functioning of network and its cooperation mechanisms in general, whereas the second section elaborates on the due process and accountability problems created by the opacity in network management.

Relations between the competition authorities

Initial experiences with the operation of ECN suggest that in general the network has produced successful outcomes so far. In particular, the Commission has not yet utilised its prerogative of bringing NCA investigations to an end. Likewise, contrary to the original predictions, there has not been any instance of a significant work allocation conflict between the NCAs. In a few instances where cases have been reallocated, reallocation took place upon agreement of the authorities involved.⁴⁷ There have been some

⁴¹ Modernisation Regulation, art.11(3). As will be explained in the following section of this article, in practice such information is shared through a database administered by the Commission called the "ECN Interactive".

⁴² Modernisation Regulation, art.11(4).

⁴³ Cengiz, "Management of Networks between the Competition Authorities in the EC and the US: Different Politics, Different Designs" (2007) 3 *European Competition Journal* 413, 421.

⁴⁴ Modernisation Regulation, arts 12, 22(1).

⁴⁵ Compare Modernisation Regulation, art.22(1)–(2).

⁴⁶ See in particular, Modernisation Regulation, arts 12(3), 28.

⁴⁷ See e.g. Commission Press Release, Memo/05/63, February 24, 2005 for the referral of a case in flat glass sector collectively by several NCAs to the Commission. The triple play offer case was reallocated from the Commission to the Spanish authority and the joint selling of football rights to the Danish and German authorities. See, Staff Working Paper, p.66.

instances of negative conflicts of case allocation, i.e. cases where no authority assumed jurisdiction which, however, were resolved swiftly upon informal discussions among competition officials.⁴⁸ Although some NCAs have been clearly more active than others in terms of the number of investigations they have conducted, there is no evidence suggesting that the network has actually followed a varied speed model.⁴⁹

In its report, the Commission tells a remarkable success story regarding the initial experiences of ECN and it goes as far as claiming that this network represents a general and novel model for multi-level policy networks in the EU.⁵⁰ The report finds only one particular weakness in the operation of network: low level of practical cooperation between the NCAs in investigations of arts 101 and 102.⁵¹ In fact, there has been no significant practical example of coordination between the NCAs where they addressed the same infringement through parallel investigations or contributed to each others' investigations through intensive evidence and information exchange. However, with its case allocation regime and the supporting information exchange mechanisms, the ECN was strategically designed to minimise the number of authorities involved in a single investigation as a precaution against inconsistency. Thus, the network design was naturally expected to result in geographical fragmentation in the enforcement of EU competition rules.⁵² From this perspective, the lack of parallel investigations appears as an achievement of one of the strategic objectives of network design, rather than a weakness in the operation of network, and it remains unclear why the Commission, the principal designer of network, finds this end result surprising.

The Commission argues that one particular factor lays behind the success of network and the lack of conflicts between network members both in the phases of case allocation and substantive application of EU competition rules: emergence of an extensive informal communication culture between the competition officials.⁵³ According to the Commission, such extensive communication enabled the network members to spot potential subjects of disagreement in the early phases and to express their respective positions in such matters fully which in turn prevented emergence of major conflicts.⁵⁴ In other words, the network informally digested and handled contested matters, which left no necessity for the utilisation of formal measures, such as the Commission's prerogative of bringing NCA investigations to an end. In fact, evidence suggests that the national and Commission officials involved in the network follow more informal and open methods of cooperation and information exchange than provided by the original network design. In practice, the NCAs and the Commission share information regarding investigations opened and subsequent procedural steps taken in such investigations through a database called the "ECN Interactive" which can be tracked by all network members. It is argued that such openness and transparency in the operation of the network facilitates consistency and thereby compensates the lack of hard jurisdictional rules and concrete dispute resolution mechanisms in the network.⁵⁵

Additionally, and to a certain extent surprisingly, although designed primarily as a policy enforcement network rather than a policy-making network, the ECN also served as an active platform for policy discussions and mutual policy learning between competition officials. Again, policy discussions within the network follow semi-formal communication mechanisms based on openness and transparency. The

⁴⁸ Staff Working Paper, p.66.

⁴⁹ Statistical data regarding enforcement activities of the NCAs can be found on the ECN's website at <http://ec.europa.eu/competition/ecn/statistics.html> [Accessed August 4, 2010]. Also some statistical analysis regarding enforcement activities of the NCAs can be found in Cengiz, "The European Competition Network" EUI Working Papers, MWP 2009/05, pp.16–17.

⁵⁰ Commission Report, p.10; Staff Working Paper, p.89.

⁵¹ Staff Working Paper, p.67.

⁵² Maher, "Networking Competition Authorities in the European Union: Diversity and Change" in European Competition Law Annual 2002, 2004, p.223.

⁵³ Commission Report, p.7; Staff Working Paper, p.77.

⁵⁴ Commission Report, p.7.

⁵⁵ I. Maher, "Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network" (2009) 7 *Comparative European Politics* 414, 428.

Director General of DG Comp of the Commission and the heads of the NCAs meet in annual Director General Meetings.⁵⁶ In addition to communication at the managerial level, policy discussions between the EU and national competition officials take place in the ECN plenary meetings, meetings of the six working groups dedicated to specific policy issues, such as the art.102 review and the harmonisation of national leniency regimes, and 13 sectoral sub-groups dedicated to competition issues in specific markets.⁵⁷ The Commission's Report on the Functioning of Regulation 1/2003 claims that communications within the ECN substantially contributed to the review process of art.102 TFEU in particular.⁵⁸ Likewise, after Modernisation and the formation of ECN, there has been a noticeable acceleration in the process of voluntary harmonisation of national procedural regimes. Modernisation has intensified the symbiotic relationship between the national and EU legal regimes in the field of procedural cooperation. National courts and NCAs utilise their respective national procedural rules when they apply arts 101 and 102 TFEU; and they impose remedies foreseen by their national legal regimes if they find an infringement in such cases.⁵⁹ Apart from a very general principle of burden of proof,⁶⁰ the Modernisation Regulation does not foresee any procedural rule, and as a result, national procedural rules and remedies remain unharmonised, subject, of course, to the general EU principles of *effectiveness* and *equivalence*. In other words, national legal regimes provide the main procedural structure for the enforcement of arts 101 and 102 TFEU at the national level, and they do so in their own diverse ways. As stated earlier in this article, at the inception of Modernisation, this procedural diversity was a matter of concern, and it was predicted to result in complications on cooperation between the competition authorities under the framework of ECN. In particular, diversity between national remedies was expected to jeopardise and complicate information exchange between legal regimes which impose civil and criminal remedies on anticompetitive behaviour respectively, due to the different levels of rights of defence enshrined in those regimes. Although art.12 of the Modernisation Regulation aimed at resolving such complications beforehand by prohibiting the use of information and evidence collected under the civil legal regimes to impose criminal remedies, this safeguard was nevertheless deemed not entirely effective, since the huge procedural diversity at the national level made it difficult even to determine when the information was actually "exchanged".⁶¹

After Modernisation, most of the Member States who used to have individual exemption regimes under their national laws have abolished those regimes in line with the Modernisation Regulation.⁶² Likewise, in the majority of Member States, powers of the NCAs have been aligned with those of the Commission to include, for example, sector inquiries and commitment decisions.⁶³ Additionally, the ECN provided a forum for policy discussions between competition officials and, therefore, was particularly operational in

⁵⁶ Report on Competition Policy 2005 (Published in conjunction with the *General Report on the Activities of the European Union-2005*) SEC(2006)761 final, para.201.

⁵⁷ *European Commission, Report on Competition Policy 2005* SEC(2006)761 final, paras 202–206.

⁵⁸ Staff Working Paper, p.73; DG Competition, Guidance on the Commission's Enforcement Priorities in Applying art.82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, Brussels, February 9, 2009, COM(2009) 864 final.

⁵⁹ Modernisation Regulation, art.5.

⁶⁰ Modernisation Regulation, art.2. However, with a recent judgment which followed a restrictive reading of burden of proof in the context of concerted practices, the Court of Justice relatively narrowed the contribution of national standards of burden proof to the enforcement of art.101 TFEU. See *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) [2010] Bus. L.R. 158; [2009] 5 C.M.L.R. 11.

⁶¹ Maher, "Functional and Normative Delegation to Non-Majoritarian Institutions" (2009) 7 *Comparative European Politics* 414, 429.

⁶² See individual country reports in H.F. Koeck and M.M. Karollus (eds), "The Modernisation of European Competition Law: Initial Experiences with Regulation 1/2003" in *FIDE XXIII Congress Linz 2008* (Vienna: Congress Publications, 2008); Staff Working Paper, p.15.

⁶³ Staff Working Paper, p.58. See also, the Report of ECN Working Group on Cooperation Issues, "Results of the questionnaire on the reform of Member States (MS) national competition laws after EC Regulation No. 1/2003", available at http://ec.europa.eu/competition/ecn/ecn_convergencequest_April2008.pdf [Accessed August 4, 2010].

the process of voluntary harmonisation. Most significantly, a specific working group was formed under the framework of ECN to address the question of harmonisation of national leniency regimes. At the inception of Modernisation, diversity of national leniency regimes was a particular matter of concern, as under this diversity and the lack of an EU-wide central leniency application regime, leniency applicants came forward only if they could comply with the requirements of the strictest national leniency regime.⁶⁴ This was an undesirable “race-to-the-top”, as it seriously interfered with the incentives of leniency applicants to reveal information. As a result of discussions within the ECN working group, an ECN Model Leniency Programme was adopted, which brings together positive policy experiences from both the EU and individual national leniency regimes.⁶⁵ Most of the national leniency regimes have so far been harmonised under the ECN model.⁶⁶ Although being an important step in terms of invigorating voluntary harmonisation, the Model does not bring a “one-stop-shop” filing system for leniency applications, and thus, inefficiency of individual application to each and every NCA operating a leniency regime continues to be a disincentive for applicants.

Despite these limited yet concrete steps in voluntary harmonisation of national procedural regimes, however, the Commission does not seem content with the current picture of diversity between the national procedural regimes. In its Report, the Commission complains from the impediments caused by different national procedural regimes to the exchange of information and cooperation between the competition authorities. According to the Commission diversity of national procedural regimes stands as the sole reason for the dissatisfactory level of practical cooperation between the NCAs,⁶⁷ and this diversity also penetrates into the Commission procedures through the mechanisms for cooperation between the Commission and the NCAs.⁶⁸ The Commission signals that harmonisation of national procedural standards may be opened to discussion in the near future.⁶⁹ As has been argued elsewhere in a more extensive contribution, such signals for further harmonisation of national rules show that Modernisation is a continuous process with spill-over effects on the EU and national legal regimes rather than a onetime spontaneous policy development.⁷⁰ Likewise, as correctly foreseen by its original proponents, contrary to what is said on the tin, the effects of Modernisation are more complex than pure decentralisation and it brings together both centripetal and centrifugal forces.⁷¹

Despite the positive initial experiences with the functioning of ECN in general, two significant caveats could be raised in objection to the Commission’s rather ambitious claim that the ECN constitutes a general model for multi-level policy networks in the European Union. Firstly, as will be discussed below at great length, although being a positive development from the perspective of network management, emergence of an informal communication culture between the competition officials comes with certain costs on due process and accountability. Secondly, the ECN still is a very young network and experiences with its

⁶⁴ C. Gauer and M. Jaspers, “Designing a European Solution for a ‘One Stop Leniency Shop’” (2006) 27 E.C.L.R. 685.

⁶⁵ See, Commission Press Release, “Competition: Commission and other ECN members co-operate in use of leniency to fight cross border cartels”, IP/06/1288; ECN Model Leniency Programme, available at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf [Accessed August 4, 2010].

⁶⁶ See ECN Model Leniency Programme: Report on Assessment of the State of Convergence, available at http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf [Accessed August 4, 2010].

⁶⁷ Commission Report, p.7.

⁶⁸ Staff Working Paper, pp.27–28.

⁶⁹ Staff Working Paper, p.62.

⁷⁰ F. Cengiz, “Regulation 1/2003 Revisited”, TILEC Discussion Paper No.2009-042, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1512527 [Accessed August 4, 2010].

⁷¹ F. Cengiz, “Regulation 1/2003 Revisited”, TILEC Discussion Paper No.2009-042, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1512527 [Accessed August 4, 2010].

operation are rather limited.⁷² Comparative network studies show that networks essentially have a time dimension and their dynamics tend to change responding to transformations taken place in the broader policy environment in which they operate and the economic and political ideas, values and objectives that network members embrace and pursue.⁷³ From this perspective, it should be noted that the ECN has not yet faced a crisis situation, an actual or potential conflict with significant connections to the national economic and political interests. For instance, it is an open question whether the network would have been able to successfully handle and digest if a similar conflict to that taken place between Germany and Belgium regarding the rescue of Opel⁷⁴ had arisen in the substantive sphere of competition policy. One can only hope that competition officials would act equally independently from the national political forces in such a crisis scenario and prevent penetrating of political conflicts into the network, but the ultimate indicator of the success of ECN as a network and that of Commission as a network manager would be the management and resolution of such a crisis situation.

Effects on Due Process and Accountability

Extensive communication and exchange of perceptions between competition officials contribute to the emergence of trust in the network which ultimately translates into more cooperation and, consequently, consistency and effectiveness in policy enforcement. Additionally, and to a certain extent unexpectedly, extensive communication between competition officials in the context of ECN resulted in concrete steps in the voluntary harmonisation of certain aspects of national procedural regimes. Thus, from the perspective of network management, emergence of an informal communication culture between competition officials is a positive development which deserves celebration. It shows that the ECN successfully achieved its primary task of serving as the infrastructure for cooperation between competition officials and contributing to the emergence of a common competition culture in Europe. Likewise, it proves that despite the extraordinary characteristics of the network design, the ECN is not called a “network” by pure coincidence, but it constitutes a genuine example of a network in the technical sense of the word, although an atypical one. Nevertheless, this communication culture comes with certain risks to accountability and due process.

The network literature discovered certain negative effects of networks on the accountabilities of network members and the policy they produce relatively late.⁷⁵ In the early literature the focus of attention centred primarily on the effectiveness of policy outcomes that networks produce, rather than the procedures they follow. The new multi-level governance literature emphasises that, as networks follow procedures which are largely opaque to the outside world, produce policy outcomes upon collective actions of multiple actors, and when it comes to the particular example of the EU, involve actors from multiple levels, they tend to obscure and escape accountability mechanisms almost by their very nature.⁷⁶ The opaqueness of network procedures stem from the fact that isolation from outside world, and particularly from principals of network members who have political identities, make it possible for network members to generate

⁷² F. Cengiz, “The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement”, EUI Working Papers, MWP 2009/05, pp.19–20.

⁷³ See, e.g. D. Marsh, M. Smith, “Understanding Policy Networks: A Dialectical Approach” (2000) 48 *Political Studies* 4.

⁷⁴ See, “Opel and Magna: A deal that stinks” *The Economist*, September 26, 2009, p.15.

⁷⁵ Y. Papadopoulos, “Problems of Democratic Accountability in Complex Environments” (2003) 42 *European Journal of Political Research* 473, 477.

⁷⁶ Y. Papadopoulos, “Problems of Democratic Accountability in Network and Multilevel Governance” (2007) 13 *European Law Journal* 469, 473–480; Y. Papadopoulos, “Taking Stock of Multi-level Governance Networks” (2005) 4 *European Political Science* (2005) 316, 321–322; C. Scott, “Accountability in the Regulatory State” (2000) 27 *Journal of Law and Society* 38, 38–40; G. Peters, “Governance, Accountability and Democratic Legitimacy”, in A. Benz and Y. Papadopoulos (eds), *Governance and Democracy: Comparing National, European and International Experiences* (New York: Routledge, 2006), pp.37–38.

consensus and take action more efficiently and effectively without facing any serious commitment problems.⁷⁷ Although being more efficient and effective, however, the opaque procedures, combined with the problem of “many hands” (i.e. the fact that networks produce outcomes based on collective and parallel actions of various members) render it extremely difficult for accountability forums to disentangle actions of a particular actor from those of the others and hold him to account.⁷⁸ The term accountability forum is used loosely here to include the classical accountability forums, such as courts or parliaments, as well as post-modern mechanisms, such as critical evaluation by the epistemic community surrounding the network.⁷⁹ Additionally, when it comes to the European Union, involvement of not only multiple actors, but multiple actors from multiple levels (i.e. the European Union, national and in some networks sub-national levels) result in multiple principal-agent problems, blur the division of mandates between accountability forums of different levels and, consequently, exacerbate the accountability problems.

In the particular example of ECN, policy outcomes are generated through collective actions of and upon communications between the Commission and national officials. Theoretically, the Commission can be held responsible by the European Parliament for its policy choices and before the EU courts for its practical enforcement actions, whereas similar kinds of relationships exist between the NCAs and their respective national forums—with some variations depending on the structure of the particular NCA in question. However, it has long been established by the political science literature that parliaments and any otherwise political institutions suffer from significant weaknesses, such as information asymmetries, when it comes to holding independent regulatory agencies accountable.⁸⁰ Additionally, it is no mystery that the Commission enjoys an unprecedented degree of independence from the EU political institutions, particularly in the field of competition policy.⁸¹ Courts, on the other hand, have only a marginal voice on the ECN regime as a whole, due to transparency problems and the ever increasing reliance on soft law measures. Firstly,

⁷⁷Papadopoulos, “Problems of Democratic Accountability in Complex Environments” (2003) 42 *European Journal of Political Research* 473, 471, 479–480; Papadopoulos, “Taking Stock of Multi-level Governance Networks” (2005) 4 *European Political Science* (2005) 316, 321–322.

⁷⁸Papadopoulos, “Problems of Democratic Accountability in Complex Environments” (2003) 42 *European Journal of Political Research* 473; Papadopoulos, “Taking Stock of Multi-level Governance Networks” (2005) 4 *European Political Science* (2005) 316, 321–322.

⁷⁹Following Haas, an epistemic community can be defined as a community of experts who share sets of normative and principled beliefs as well as causal beliefs and objective notions of validity, and who belong to a common policy enterprise. See, P.M. Haas, “Epistemic Communities and International Policy Coordination” (1992) 46 *International Organization* 1, 3. When this article uses the concept of “epistemic community”, it refers to the community of academics, researchers, legal and economic counsel and any otherwise natural persons who have substantial expertise in the field of competition policy and who share a firm belief in free market economy and showed this belief and expertise through any kind of intellectual or practical activity. This community excludes the Commission and NCA officials, who are bound to the ECN by way of direct membership. This article does not go into the theoretical debate of whether such community really exists in the field of European competition policy, but it a priori accepts arguments of previous pieces of research which suggest that it does. See, e.g. Y. Dezalay, “Technological Warfare: The Battle to Control the Mergers and Acquisitions Market in Europe”, in Y. Dezalay and D. Sugarman (eds), *Professional Competition and Professional Power: Lawyers, Accountants and the Social Construction of Markets* (London and New York: Routledge, 1995), pp.77–113.

⁸⁰Weaknesses of classical political accountability forums under the mist of regulatory state are nicely summarised in Scott, “Accountability in the Regulatory State” (2000) 27 *Journal of Law and Society* 38, 38–40. The regulatory state literature therefore turns its attention to possible new forums and mechanisms which could compensate the weaknesses of classical political accountability mechanisms. Scott himself suggests two mechanisms, namely “interdependence” and “redundancy”. However, these rather innovative mechanisms are yet to be empirically tested in terms of their effectiveness.

⁸¹McGowan, “Safeguarding the Economic Constitution: The Commission and Competition Policy” in *At the Heart of the Union: Studies of the European Commission* (London: Macmillan, 1997), p.147; McGowan and Wilks, “The First Supranational Policy in the European Union: Competition Policy” (1995) 28 *European Journal of Political Research* 141, 149.

procedures of the ECN are mostly determined by soft law measures, apart from certain specific rules and safeguards of information exchange set forth in the Modernisation Regulation. The General Court has recently confirmed in a case involving the ECN work allocation regime that those procedures fell beyond the reach of judicial control.⁸² Secondly, policy initiatives and discussions within the network mostly lead to, if any, informal non-binding policy communications. As the example of art.102 review shows, however, these communications may at times touch upon fundamental elements of the European competition law regime and cause controversy as to whether they stay loyal to the judicial interpretation of those elements or imply a subtle yet significant policy change through the back door.⁸³ Extensive reliance on soft law measures alienates the courts from the network and, consequently, results in the marginalisation of judicial control over the decisions taken within the network as a safeguard of the rights of parties under investigation and the third parties. Likewise, it also eliminates the possibility of courts serving as a forum for the resolution of disputes between the network members themselves, for instance, in cases of work allocation conflicts.

Additionally, due to the multi-level nature of the network, boundary problems arise between accountability forums of different levels. Policy discussions and enforcement actions which take place within the ECN are likely to produce impacts on the European Union and the national competition regimes simultaneously due to the symbiotic relationship between these regimes. For instance, in its report, the Commission highly praises contributions of the sectoral and sub-sectoral policy groups created under the framework of the ECN to the review process of art.102.⁸⁴ This review is naturally expected to produce impacts on the similar provisions of national laws, as the officials who participated in the discussion are the same ones who are also responsible for the interpretation and enforcement of parallel provisions of national laws. Under this complex reciprocal influence scenario, it becomes extremely complicated to determine where the main forum of accountability lies: at the EU or national level or at both levels concurrently? If the third option is to be followed would accountability regimes of different levels support each other by catching false positives of one another or would they complicate each others' actions by entering into territorial spats? And finally, would the existing mechanisms for cooperation between the EU and national accountability forums, such as the preliminary rulings mechanism and the cooperation mechanisms between the parliaments brought by the Lisbon Reform Treaty, provide sufficient bases for coordinated and effective accountability check or is there a need for new and innovative mechanisms of cooperation between those forums?⁸⁵ These are novel questions facing the EU competition policy which are yet to be acknowledged and debated.

Although weak in terms of "process accountability", networks are believed to be superior organisations from the perspective of "output accountability", as they produce more responsive and effective policies based on collective actions of multiple actors who bring their relative individual expertise and advantages

⁸² *France Telecom SA (formerly Wanadoo Interactive SA) v Commission of the European Communities* (T-340/03) [2007] E.C.R. II-107; [2007] 4 C.M.L.R. 21 at [83].

⁸³ A.C. Witt, "The Commission's Guidance Paper on Abusive Exclusionary Conduct - More Radical than it Appears?" (2010) 35 E.L. Rev. 214. See also the special issue of *European Competition Journal* on art.102 Discussion Paper (2006) 2 *European Competition Journal*. For the role of soft law measures in the EU competition regime in general see I. Maher, "Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement?" (2008) 31 *Fordham International Law Journal* 1713; O.A. Stefan, "European Competition Soft Law in European Courts: A Matter of Hard Principles?" (2008) 14 *European Law Journal* 753.

⁸⁴ Staff Working Paper, p.73; DG Competition, Guidance on the Commission's Enforcement Priorities in Applying art.82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, Brussels, February 9, 2009, COM(2009) 864 final.

⁸⁵ For instance, it has been argued that in a networked polity like the European Union, the only way of establishing effective accountability mechanisms is to design corresponding multi-level networks between the accountability forums of different levels. See Carol Harlow, Richard Rawlings, "Promoting Accountability in Multilevel Governance: A Network Approach" (2007) 4 *European Law Journal* 542.

to the process.⁸⁶ Hence, in general, weaknesses of networks in process accountability are compensated by their output accountability to a certain degree. However, one cannot help but wonder, whether this argument still holds when it comes to the specific examples of ECN and EU competition policy. Since the late 1990s we have been observing an immense reform project administered by the Commission, where the individual elements of EU competition policy are opened up to question and transformed one by one with the motto of establishing a more “economics-based approach”. Arguably, this process stems from the divorce between European competition policy and its original *raison d’être*, the Common Market objective, with the completion of the 1992 Single Market Programme which resulted in an “identity crisis” for competition policy as argued by Gerber in his seminal 1994 article.⁸⁷ Although the debate surrounding this reform project is carried along in a substantial technical dimension and in extreme sophistication, what is sought at the end of the day is an underlying purpose for European competition policy (i.e. economic efficiency and/or consumer welfare) or “identity”, as suggested by Gerber. Therefore, it becomes highly questionable whether such an “ends-justify-means” approach to accountability would work in the context of EU competition policy, as its ends currently seem as contested as its means.

When it comes to post-modern mechanisms of accountability on the other hand, such as the critical evaluation by the epistemic community, the opaque nature of network proves to be a significant impediment. As explained in the previous part of this article, the ECN has followed more open and transparent communication mechanisms than originally foreseen in member-to-member relations. In contrast, however, the network has been extremely opaque to the outside world. Policy discussions taking place within the network, such as those regarding the ECN Leniency Model and the review of art.102 TFEU, as well as daily technical discussions, such as those regarding work allocation, are largely unobservable for outside actors. Previous comparative research on policy networks shows that, as a general characteristic, at times of intense cooperation, networks tend to isolate themselves from outside actors, who are not bound to the network with a membership link.⁸⁸ This stems from the fact that network members develop their own “cosy” and technical way of communication which they feel comfortable with; and additionally, that at times of intense cooperation network members do not need to form alliances with outside actors to achieve their goals, since intra-network cooperation provides sufficient ground to do so. This opacity jeopardises, if not entirely prevents, active, critical and timely contribution of the epistemic community to the discussion process. Under this opacity, contribution of the episteme to the actions of and decisions taken within the network follows conventional *ex post* paths, such as critical evaluation voiced at major academic events⁸⁹ which will potentially influence network members and affect future actions and decisions of the network, rather than reacting to what is going on within the network now. It may be argued that transparency within the network compensates opacity to the outside world by providing a basis for what is known as “peer-to-peer” accountability, which essentially means that when being observed by other members, who have equally substantial technical knowledge of the policy and the markets, network members will naturally be inclined to perform their tasks effectively in order to protect their prestige in the eyes of their peers.⁹⁰

⁸⁶Papadopoulos, “Problems of Democratic Accountability in Complex Environments” (2003) 42 *European Journal of Political Research* 473, 477; Papadopoulos, “Problems of Democratic Accountability in Network and Multilevel Governance” (2007) 13 *European Law Journal* 469, 473.

⁸⁷David J. Gerber, “The Transformation of European Community Competition Law” (1994) 35 *Harvard International Law Journal* 97, 143.

⁸⁸F. Cengiz, “Antitrust Federalism in Comparison: Multi-level Enforcement of Competition Policy in the US and the EC”, PhD thesis submitted to the University of East Anglia, Faculty of Social Sciences, August 2008.

⁸⁹For instance the annual conferences of the Fordham Competition Law Institute in New York and the annual EU competition workshops of the Robert Schuman Center for Advanced Studies in Florence are known to send strong and influential signals from the episteme to the competition authorities and officials.

⁹⁰Maher, “Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network” (2009) 7 *Comparative European Politics* 414, 428; Scott, “Accountability in the Regulatory State” (2000) 27 *Journal of Law and Society* 38, 38–40.

Nevertheless, it should not be forgotten that the technical “cosiness” within a network brings with it the danger of “group think”,⁹¹ i.e. network members becoming resistant to perceptions of outside actors and to reflecting those perceptions in the policy decisions and enforcement actions they take. From this perspective, particularly under the current extensive reform process of the EU competition policy critical contributions of the episteme as well as the business and consumer organisations to the discussion process prove vital for the responsiveness of EU competition policy to the needs of the markets and the subjects of the policy.

This analysis suggests that, from an accountability point of view, the ECN and ultimately the subjects of EU competition rules may benefit from more transparency in network management. The traditional administrative law literature makes a distinction between independent regulatory agencies and agencies entrusted with the task of service delivery from the perspective of accountability.⁹² The literature argues that when it comes to independent regulatory agencies, accountability mechanisms fly in the face of political independence which is one of the key reasons of delegation to these agencies in the first place.⁹³ It cannot be contested that transparency is a delicate matter in the context of networks between independent regulatory agencies, as it requires balancing between the strategic objectives of administrative efficiency and protection from outside political interference on the one hand, and protection of accountability on the other. However, if one goes back to the basics; adheres to the distinction between direct political control and accountability provided by the same literature⁹⁴ and sticks to the classical definition of accountability short of political interference,⁹⁵ it is not altogether clear why transparency as a method of accountability would prove so problematic. This article cannot offer an ideal model to suggest where exactly the balance should be struck in the context of ECN in order to increase accountability without compromising independence. The task of drawing this balance will ultimately fall on the European Commission, the network manager, possibly with the participation of other network members. Additionally, pure transparency would not automatically translate into amelioration of accountability problems the network brings with, as it does not result in concrete remedies and thus, lacks the “facing consequences for the actions taken” element of the classical accountability definition.⁹⁶ Nevertheless, due to the weaknesses of classical accountability forums in the field of competition policy, active and critical participation of the epistemic community to the discussion process plays a vital check, particularly under the current reform process, which even though cannot result in remedies being imposed on the authorities and officials involved, nevertheless may force them to be more cautious for the sake of their reputation and increase the responsiveness of the policy by providing input from its subjects.⁹⁷

In addition to these accountability problems of general nature, informal cooperation mechanisms of the ECN also raise some significant tensions from a more specific due process perspective. Most substantially, observations expressed by the Commission on the envisaged decisions of the NCAs in enforcement of

⁹¹ Arthur Benz, “Accountable Multilevel Governance by the Open Method of Coordination?” (2007) 13 *European Law Journal* 505, 513; Guy Peters and Jon Pierre, “Multi-level Governance and Democracy: A Faustian Bargain?” in Ian Bache and Matthew Flinders (eds), *Multi-level Governance* (Oxford: Oxford University Press, 2005), p.85.

⁹² P.P. Craig, *Administrative Law* (London: Thomson, Sweet & Maxwell, 2003), pp.106–107.

⁹³ Craig, *Administrative Law*, 2003, pp.106–107.

⁹⁴ Craig, *Administrative Law*, 2003, p.99.

⁹⁵ Accountability is classically defined as “a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences”. See M. Bovens, “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *European Law Journal* 447, 468.

⁹⁶ M. Bovens, “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *European Law Journal* 447, 468.

⁹⁷ See also I. Maher, “Economic Governance: Hybridity, Accountability and Control” (2007) 13 *Columbia Journal of European Law* 679, 697 arguing that in cases where political accountability mechanisms are weak, transparency and participation at the policy formulation stage may provide an alternative solution.

arts 101 and 102 TFEU are not open to the parties under investigation, and consequently, parties cannot respond to those observations. The Commission denies that this opacity causes any due process problems arguing that its observations do not raise any “new evidence or any other information that would be exculpatory or incriminating for the parties”.⁹⁸ However, the Commission also admits that its observations significantly affect the national proceedings and are almost always taken into account in the decisions of the NCAs.⁹⁹ Additionally, in most national investigations, arts 101 and 102 are enforced simultaneously with the parallel provisions of national laws. Moreover, the Modernisation Regulation foresees a strict supremacy standard which practically means that, when applied in parallel to arts 101 and 102 TFEU, national competition rules can neither reach to stricter nor laxer outcomes than required by the statutory interpretation of arts 101 and 102, with the specific exceptions of national rules governing unilateral conduct, national merger rules and rules embracing a different objective than protection of competition, such as the national rules against unfair trade practices.¹⁰⁰ Under these circumstances, NCAs will naturally be inclined, if not obliged, to follow Commission observations both in the enforcement of arts 101 and 102 TFEU and that of respective provisions of their national laws. Thus, the due process problems created by the opacity of communications within the ECN potentially but strongly penetrate into the national procedural regimes.

The accountability and due process problems identified and the questions raised above clearly go beyond the specific domain of European competition policy and penetrate into the broader debate on multi-level governance in Europe. Before the Modernisation, enforcement of EU competition policy was centralised in the hands of the Commission and, therefore, competition policy constituted a significant exception to the general EU method where supranational rules and policies were in large part enforced by the national officials with whom the Commission formed symbiotic relations through oversight mechanisms and multi-level policy networks.¹⁰¹ Due to this rather “special” status, for more than four decades, competition policy stayed immune from the general problems of multi-level governance, such as those identified in this article, which provoked intense debates in other policy areas, arguably starting with the EU industrial policy.¹⁰² One significant consequence of the decentralisation and the formation of ECN is the weakening, if not the entire demise, of such special position of EU competition policy. Most probably the designers of Modernisation and the ECN neither intended nor foresaw this consequence. Whether this is an intended result or not, however, clearly, competition policy can no longer escape the general systemic problems of multi-level governance. Arguably, these problems will be voiced strongly in the future and expect mechanisms to be designed for their resolution, above all by the Commission, the network manager, possibly with the contribution of other network members. From this overall analysis one potentially important lesson emerge also for the epistemic community of EU competition law and policy: due to the heavy involvement of economic theory in the interpretation and application of competition rules, this epistemic community is known to have developed its own technical language and stayed relatively in

⁹⁸ Staff Working Paper, p.75.

⁹⁹ Staff Working Paper, p.76.

¹⁰⁰ Modernisation Regulation, art.3(2).

¹⁰¹ Liesbet Hooghe and Gary Marks, *Multi-Level Governance and European Integration* (Lanham, Maryland: Rowman & Littlefield Publishers, 2001), p.25.

¹⁰² The debut of the theory of multi-level governance is popularly attributed to the analysis of complex relations between the supranational, national and sub-national actors in the domain of EU industrial policy and the distribution of regional funds in the EU by Gary Marks. See G. Marks, “Structural Policy in the European Community”, in A.Sbragia (ed.) *Europolitics: Institutions and Policymaking in the “New” European Community* (Washington: The Brookings Institute, 1992). See also Chris Ansell, “The Networked Polity: Regional Development in Western Europe” (2000) 13 *Governance* 303. Upon a review of different policy areas, Peters and Pierre define multi-level governance as a “Faustian bargain” as far as normative issues such as accountability and legitimacy are concerned. See Peters and Pierre, “*Multi-level Governance and Democracy: A Faustian Bargain?*” *Multi-level Governance*, 2005, p.85.

isolation from the other policy fields and the debate on EU governance in general.¹⁰³ Since EU competition policy is now facing the general systemic problems of multi-level governance, perhaps it may be time that the epistemic community communicates with other policy fields more intensely in search of the solutions and contributes to and learns from the debates on EU governance in general.

Conclusions

ECN came into existence as the infrastructure of communication and cooperation between the competition authorities of Europe and to protect the consistency of policy enforcement in the era of decentralisation. As it was an atypical network and did not reflect the general characteristics of networks, predictions regarding its future operation were largely sceptical at the time of its inception. This network has now completed its fifth year in operation. Initial experiences of the ECN show that the network has functioned effectively overall and was particularly operational in invigorating an extensive communication culture among the competition authorities and officials of Europe. This culture, however, comes with certain costs on due process and accountability. The overall analysis shows that with decentralisation and the formation of ECN, competition policy has become more prone to the general systemic problems of multi-level governance in the EU. In particular, the opacity in network management constitutes a significant impediment to accountability and due process. Arguably these problems will emerge strongly in the future and the ultimate responsibility for their resolution will fall to the Commission, the network manager, possibly with the contributions of other network members. Likewise, this general conclusion also suggests that the epistemic community of EU competition law and policy may benefit from more intense communication with other policy fields and the broader debate on EU governance in search of the solutions.

¹⁰³ Maher, "Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network" (2009) 7 *Comparative European Politics* 414, 424–25.